Stevens Ford, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Local 376. Case 39-CA-362

31 July 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 22 February 1984 Administrative Law Judge Winifred D. Morio issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

The judge found that the Respondent owed unit mechanics a specified amount of bonus pay. She also delineated on a quarterly basis how much was owing to each of the four named mechanics who were in the Respondent's employ at the beginning of the backpay period. However, in adding together the specified quarterly amounts, the judge omitted the third quarter of 1981 from the total. The judge further failed to list the amounts owing to three mechanics who joined the Respondent's employ during the backpay period. Finally, the judge made minor mathematical errors. Accordingly, we find the bonus pay due the Respondent's mechanics is as follows:

Leland Aldredge	$214.08
Pasquale Cicarelli	21.96
Arnold Colwell	275.82
William Everett	1,708.29
William Hull	1,295.50
James Hussey	1,155.76
Frederick Rauch	1,192.59

ORDER

The National Labor Relations Board orders that the Respondent, Stevens Ford, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall make whole the following employees by payment to them of the moneys listed below, with interest, as provided in the Board's Order in the underlying unfair labor practice proceeding as enforced by the court, as well as any additional backpay, plus interest accruing after the backpay hearing, until the Respondent fully complies with this Order.'

Name	*Backpay*	*Bonus*	*Total*
Leland Aldredge	$683	$214.08	$897.08
William Bell	1,312	0	1,312.00
Charles Burgess	1,010	0	1,010.00
Pasquale Cicarelli	404	21.96	425.96
Arnold Colwell	0	275.82	275.82
Garry Currano	810	0	810.00
William Everett	821	1,708.29	2,529.29
James Holmes	871	0	871.00
William Hull	323	1,295.50	1,618.50
James Hussey	845	1,155.76	2,000.76
Nicholas Karoly	857	0	857.00
John Mulvey	730	0	730.00
Frederick Rauch	197	1,192.59	1,389.59
Robert Spiegel	836	0	836.00
Luis Velasquez	783	0	783.00

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. This case was tried before me on May 10, 1983, pursuant to a backpay specification and notice of hearing which was issued on December 13, 1982, by the Officer in Charge, Subregion 39. The backpay specification alleged, in substance, that certain wage increases were withheld and bonuses were not paid by Stevens Ford, Inc. (Respondent/Company) to its employees. The specification was based on a complaint which was issued on December 19, 1980, by the Acting Officer in Charge, Subregion 39, and an amended complaint which issued on September 29, 1981. The amended complaint alleges that Respondent engaged in a series of unfair labor practices against its employees because of their activities on behalf of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Local 376 (Union).[1] On October 6, 1981, pursu-

[1] The Respondent contends that the judge's Decision and Order in the underlying unfair labor practice did not encompass the 5 September 1981 wage increase it gave to only the four Lincoln-Mercury employees and that it therefore did not have notice of its alleged liability for the 5 September increase. On the basis of this absence of notice, the Respondent argues that it did not admit liability for this increase when it withdrew its answer to the complaint in the underlying case. The Respondent litigated this issue before the judge, and we agree with the judge's rejection of the Respondent's contentions.

[2] We have modified the judge's Order to clarify that the amount of backpay listed in the backpay specification does not limit the Respondent's backpay obligation. Rather, the Respondent's obligation continues to accrue until the Respondent fully complies with the Board's Order in the underlying unfair labor practice case. See *Amshu Associates*, 234 NLRB 791, 797 (1978).

[1] The amended complaint retained the allegations contained in the original complaint, including the allegation that Respondent had withheld regularly scheduled wage increases on November 10, 1980. It added the allegation that Respondent had withheld regularly scheduled wage increases since on or about April 10, 1980.

ant to that complaint, a hearing was held before Administrative Law Judge Joel A. Harmatz. At the hearing Respondent withdrew the answer which had been filed to the complaint with the understanding that Judge Harmatz would issue a decision within 3 weeks finding the substantive violations as alleged in the complaint. Thereafter, on November 4, 1981, Judge Harmatz issued his Decision and Order wherein he found that Respondent had violated the Act in the following manner:

> Since in or about April 1980, Respondent has withheld both scheduled wage increases and improved insurance benefits from the employees in the appropriate bargaining unit described below.
>
> Since in or about April 1980, Respondent has discriminated in the assignment of work and the awarding of bonuses for that work to the employees in said bargaining unit.
>
> On or about November 10, 1980, Respondent withheld regularly scheduled wage increases to employees in said bargaining unit.
>
> Since on or about April 10, 1980, Respondent employed nonbargaining unit employees to perform bargaining unit work.
>
> On or about July 2, 1980, Respondent, acting through William P. Stevens, at Respondent's facility:
>
> Encouraged its employees to circulate a petition among its employees to decertify the Union;
>
> Promised its employees that benefits would increase and conditions of employment would improve if employees rejected the union as its bargaining representatives;
>
> Threatened its employees by telling them that it is futile for them to remain members of or support the Union and that Respondent never would negotiate, recognize, or deal with the Union.
>
> On or about October 14, 1980, and October 20, 1980, Respondent, acting through William Stevens and John Cavadini, at Respondent's facility:
>
> Encouraged its employees to circulate a petition among its employees to decertify the Union;
>
> Promised its employees that benefits would increase and terms and conditions of employment would improve, if employees rejected the Union.

This decision was adopted by the Board on February 24, 1982, and enforced by the Court of Appeals, Second Circuit, on May 18, 1982.

The parties were unable to resolve issues relating to what wage increases and bonuses were due, if any, by virtue of the decision. Accordingly, the backpay specification was issued.

The basic issue with respect to the backpay specification, insofar as it relates to the wage increase aspect, centers on whether Respondent's failure to grant a wage increase to its employees on September 5, 1981, although it had granted a wage increase to employees of Stevens Lincoln Mercury, Incorporated (Lincoln Mercury) on that day, was a continuation of conduct found unlawful by Judge Harmatz and, therefore, covered by his Decision and Order, as contended by counsel for the General Counsel, or whether it constituted a separate issue, which was not litigated and, therefore, was not covered by Judge Harmatz' decision, as contended by Respondent. In addition, Respondent contends that the Board representative misled Respondent at the time of the underlying unfair labor practice hearing by failing to apprise its representatives at that time that its failure to give an increase to its employees on September 5, 1981, was considered a violation. Further, Respondent claims that in May 1981 it had settled, with the assistance of a Board representative, the wage claim set forth in the complaint and, therefore, further moneys were not due. In addition, Respondent contends that the wage increases granted to Lincoln-Mercury employees on September 5, 1981, were not the type of increases encompassed by Judge Harmatz' Decision and Order. Finally, it is Respondent's position that the formulas utilized by counsel for the General Counsel to determine the amount of wages or bonuses due is incorrect.[2]

FACTS

A. *Wage Increases*

William Stevens, president and owner of Respondent/Company, was, at the times relevant to this proceeding, also president and owner of another company, Stevens Lincoln Mercury, Incorporated. Both companies employed maintenance and service employees: The employees of Respondent serviced, primarily, Ford cars at one facility and the Lincoln Mercury employees serviced Lincoln Mercury cars at another facility. The Union, in 1979, began efforts to organize Respondent's employees but did not extend these organizational efforts to the Lincoln Mercury employees.

According to John Cavadini, Respondent's comptroller, in January 1979 Respondent attempted to implement some wage increases for its employees but it was unable to do so because of the Union. However, a wage increase was given to the Lincoln Mercury employees in February 1979. In early 1980 the Lincoln Mercury facility was closed and the service and maintenance employees at that facility were transferred to Respondent's facility. Thereafter, both groups of employees performed maintenance work on Ford and Lincoln Mercury vehicles under the same supervisor. On November 10, 1980, the Lincoln Mercury employees received another wage increase which again was not given to Respondent's employees. The original complaint, which issued on December 10, 1980, alleged the withholding of this wage increase on November 10, 1980, as a violation.[3]

In March 1981, after the initial complaint was issued but before the hearing on that complaint was held, the parties met to discuss possible settlement of some of the allegations of the complaint, including the allegation relating to Respondent's failure to grant a wage increase to

[2] Counsel for the General Counsel filed a motion to strike part of the answer but this motion was withdrawn during the hearing after Respondent amended its answer.

[3] Respondent contends that on November 4, 1980, its representatives requested the assistance of the Regional Office in an effort to implement a wage increase for its employees. Respondent claims that the Region refused to assist those efforts at that time.

its employees in November. Present at the meeting were William Stevens, John Cavadini, Mal Chapman, president, comptroller, and general manager, respectively of the Company and Russell See, a business agent, and William Everett, an employee, for the Union. Robert Cheverie, a Board agent, also was present at the request of the parties. Cheverie, Cavadini, and Everett testified concerning this meeting. According to Cheverie, Respondent's representatives stated, during the meeting, that it was their intention to settle the allegations of the complaint relating to the failure to grant the wage increases. As noted, at that point the complaint referred only to a wage increase which was withheld in November 1980. It is undisputed that in these discussions the wage increases granted to the Lincoln Mercury employees were considered by the parties in their efforts to determine what moneys were owed by Respondent with respect to the wage claim liability. Cheverie and Everett testified that the Lincoln Mercury employees were compared, on an individual basis, with Respondent's employees of equal skill in an effort to determine the moneys due. Cavadini claimed that other factors, such as industry practice, also were considered by the parties. In any case, whether the fact of the increases given to the Lincoln Mercury employees was the factor utilized by the parties or only one of the factors considered, it is evident from this record that it was the most important factor used by the parties to determine the wage increases due to Respondent's employees. The parties were able to reach agreement with respect to some of the moneys owed but were unable to reach a complete agreement and the negotiations were discontinued. In May 1981, Respondent unilaterally implemented the wage increases discussed at the March meeting. Respondent contends that the "NLRB concurred that the Respondent's increases to its Ford employees were so substantial as to satisfy the agency as to the backpay wage claim set forth in its complaint of December 1980." Cheverie, whose testimony about the meeting was supported by Cavadini, did not testify that there had been such a concurrence. Furthermore, Cavadini testified that the Board representative stated only that the granting of the wage increases by Respondent would not be considered an unfair labor practice. There is no dispute that the moneys paid by Respondent to its employees did satisfy Respondent's wage claim liability up to May 1981 and counsel for the General Counsel is not seeking additional moneys for that period of time.

At some point prior to September 5, 1981, Stevens Lincoln Mercury commenced selling Chrysler-Plymouth cars under the name, "Stevens Chrysler Plymouth." Several of the Lincoln Mercury employees then at the Ford facility were transferred to Lincoln Mercury facility to work on Chrysler-Plymouth cars. However, four of the Lincoln Mercury employees remained at the Ford facility where they continued to service both Ford and Lincoln Mercury cars, as did Respondent's employees. On September 5, 1981, these four employees, William Bottomley, Furis Brady, James Cataldo, and Michael Cheny, received wage increases. These increases were not granted to Respondent's employees. Cavadini, initially, testified that Bottomley, Cataldo, and Cheny were given these increases to bring their salaries into parity with Respondent's employees who had received an increase in May 1981. In addition, Cavadini testified that the fourth employee, Brady, had been on an extended probation because of his absentee record but by September 5, 1981, he had improved his record and, therefore, he also received a raise. Cavadini subsequently testified that Bottomley, Cheny, and Cataldo received the September 5, 1981 increase because of their abilities and skills and that improved attendance was a very important factor in calculating a merit increase. Thus, it appears from Cavadini's testimony that the increases given to the Lincoln Mercury employees were merit increases.

The record also reveals that in May 1981 Respondent's employees received increases ranging from 20 cents an hour for an employee, Billy Jo Bell, to $1.65 an hour for Bill Everett, a senior employee. During the period that Respondent's employees' wages were frozen, Bottomley had received increases amounting to $1.90 an hour and Cheny had received increases in excess of $2 an hour.[4] It further appears that, before the September 5, 1981 increase, Bottomley was paid $7.40 an hour, Cataldo $7.50 an hour, and Cheny $7.90 an hour. The only Respondent employee who was paid an amount greater than Bottomley and Cataldo, at that time, was Everett who received $7.75 an hour. Everett, however, was paid less than Cheny both before and after the September increase. Insofar as this record discloses, the usual probationary period was 3 months. Brady was hired in January 1980, and he received a wage increase at the end of the usual 3-month probationary period.

B. *The Bonus*

The record reflects that only mechanics were entitled to bonus pay. Respondent, during the backpay period, employed four mechanics; William Everett, William Hull, James Hussey, and Frederick Rauch. Cavadini, initially, testified that Hussey, unlike the other three mechanics, earned his bonus pay primarily because of work he performed in the preparation of new cars. Cavadini claimed that Hussey's work was not transferred to the Lincoln Mercury employees and, therefore, his loss of bonus pay was due to a decline in new car sales. Subsequently, Cavadini admitted that Hussey also performed other mechanical work but he claimed that Hussey did not make bonus pay on that work. However, according to figures contained in Appendix C of the backpay specification,[5] Hussey did earn bonus pay throughout the backpay period, in some instances greater than the bonus pay received by the other mechanics.

The parties agree that the backpay period with respect to the allegation concerning the denial of the bonus pay commenced in April 1980 and extended through to Sep-

[4] It appears that since at least 1979 the Lincoln Mercury employees were reviewed at about the same time. Thus, the record reveals that all Lincoln Mercury employees received a raise in February 1979, 6 of the 8 employees received raises in February 1980 and 7 of 11 received raises in November 1980.

[5] This information was secured for Respondent's records.

tember 1981.[6] Counsel for the General Counsel contends that the amount of backpay owed by Respondent for discriminatorily denying bonuses to its employees should be determined by the amount of increases in the bonuses earned by the Lincoln Mercury employees during the liability period and the actual amount due can be ascertained by comparing the quarterly bonuses earned by the Lincoln Mercury employees during the backpay period with the average quarterly bonus they received for the four quarters preceding the backpay with the average quarterly bonus they received for the four quarters preceding the backpay period.[7]

It is the contention of Respondent, however, that the determination as to what moneys are due can be made only by comparing the bonus moneys earned by Respondent's employees prior to the transfer of Lincoln Mercury employees to the Ford facility with the bonus moneys they earned after that transfer. The difference between the two figures represents the moneys owed, according to Respondent. Respondent further contends that the formula proposed by counsel for the General Counsel fails to take into consideration the fact that prior to their transfer to the Ford facility the method used to calculate bonus pay for the Lincoln Mercury employees was different from the method used to calculate the Ford bonuses and this difference in method resulted in the Lincoln Mercury employees receiving less bonus moneys when they worked at the Lincoln Mercury facility.[8] However, when the Lincoln Mercury employees were transferred to the Ford facility they were paid bonus moneys under the system utilized at that facility and it was this factor, according to Cavadini, that caused an increase in the bonus moneys they earned, rather than the fact that they performed more work on Ford cars.

Cheverie, who prepared the calculations set forth in the backpay specification, testified that he did not know if the two facilities utilized different formulas to determine bonus pay prior to the transfer of the Lincoln Mercury employees to the Ford facility. However, according to Cheverie, the crucial fact was not whether different formulas were used prior to the transfer but was, rather, whether the work being done by the Lincoln Mercury employees while they were at the Ford facility was work on Ford cars which should have been performed by Respondent's employees. Concerning this issue, Cheverie testified that during the March meeting Bill Everett claimed that 80 percent of the maintenance work being done by the Lincoln Mercury employees was work on Ford cars, work which Respondent's employees should have performed. Cheverie further stated that Respondent's representatives denied that the figures were that high but did concede that about 70 percent of the maintenance work performed by the Lincoln Mercury employees was work on Ford cars. Cheverie claimed that, due to minor differences between Everett's estimation and the concession by Respondent's representatives, he did not consider it necessary to examine Respondent's records.[9] In effect, he accepted the 70 percent figure as a reasonable one.

Discussion

It is undisputed that the amended complaint contains two allegations relating to the withholding of wage increases. One allegation refers to a specific time when the increases were withheld, i.e., November 10, 1980. The second allegation contains the broad language, "Since on or about April 1980" wage increases were withheld. Notwithstanding the broad language contained in the amended complaint, Respondent contends that it was unaware that the additional allegation was added to include its withholding of the September 5, 1981 wage increase from its employees. It is difficult to understand how Respondent could have failed to understand the significance of the additional allegation, particularly in view of the fact that the issuance of the amended complaint followed quickly after Respondent withheld increases to its employees, although granting them to the Lincoln Mercury employees. It is also difficult to accept that Respondent did not realize that its conduct in September 1981 was identical to conduct already alleged to be in violation of the Act. Respondent claims, however, that it believed that the amended complaint was issued in September only to reflect the period of time used by the parties, during the March meeting, when they attempted to resolve the wage liability claim. Respondent's belief as to the reason for the new complaint would be more acceptable if the amended complaint had issued in March or April when the negotiations occurred and not several months after those events. I do not credit the explanation advanced by Respondent as to its understanding of the allegations of the amended complaint. Moreover, this record discloses that Respondent had received subpoenas prior to the October 6, 1981 hearing wherein the General Counsel sought the payroll records of both companies from July 1979 to October 1981. If Respondent believed that its liability was limited to May 1981, it could or should have made a motion to quash the subpoena because the material sought was, according to its contention, outside the scope of the complaint. Respondent did not file such a motion.[10]

Based on this record, I find that Respondent, by virtue of the language of the amended complaint and the subpoenaed documents, was made aware that it was the position of counsel for the General Counsel that the violation as alleged was not limited to a particular point in time but was meant to encompass any action by Re-

[6] It was concluded by the Region that the four Lincoln Mercury employees who remained at the Ford facility location had accreted to the Union's bargaining unit. This fact had the effect of terminating any liability by Respondent at this point, with respect to the subcontracting of work and the bonus payments.

[7] During the four quarters preceding the backpay period the Lincoln Mercury employees were in the Lincoln Mercury facility and worked on Lincoln Mercury vehicles.

[8] According to Cavadini, at the Lincoln Mercury facility nonproductive hours were included in computing whether a bonus would be paid and this factor reduced the amount of bonus pay an employee could earn. At the Ford facility nonproductive hours were not included in the hours worked and, therefore, the comparison between hours worked and productive hours was more favorable.

[9] At one point, according to Cheverie, Travers, the general manager, apparently as a compromise suggested that the parties "split the difference" between the two figures.

[10] Respondent did not file motion for a bill of particulars.

spondent wherein it withheld wage increases from its employees for discriminatory reasons. Further, the Decision and Order by Judge Harmatz tracks the broad language of the amended complaint. In these circumstances, I find that Respondent by withholding the wage increase on September 5, 1981, engaged in conduct found discriminating in the underlying unfair labor practice proceeding. Accordingly, I find that the conduct does not involve a new issue which has not been litigated.

Respondent's contention that it withdrew its answer based on either direct or implied assurances by counsel for the General Counsel that it had satisfied its wage claim liability by payment of moneys to its employees in May 1981 is not supported by this record. As noted, the only reason set forth for the withdrawal of the answer, in the transcript and the decision, relates to Respondent's desire to mitigate damages. Further, neither Cheverie nor Cavadini testified that Respondent was told that the unilateral payment of moneys in May 1981, after the parties could not reach agreement, would satisfy Respondent's liability with respect to the wage claim aspect. Cavadini testified that the assurances about those payments were only that the payments would not be considered the basis for a new unfair labor practice charge. However, assuming that Respondent had been told that if an agreement was reached which was satisfactory to all parties Respondent's wage claim liability would be considered satisfied, that statement would have no effect on the instant case. It is undisputed that the case was not settled in March 1981 and Respondent's unilateral action in May 1981 cannot substitute for a settlement entered into by all parties, including the Board representative. "It is well settled that an individual may not waive, bargain away, or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed, a public right which only the Board or the Regional Director may settle."[11] It is obvious that if the discriminatee cannot waive the amounts of moneys deemed to be due, Respondent cannot unilaterally decide what moneys will resolve the backpay claim.

Respondent's assertion that the September 5, 1981 increases were not the type of increases encompassed by Judge Harmatz' decision also is without support. That decision refers to scheduled wage increases and this record reveals that at least since 1979 Respondent has reviewed the Lincoln Mercury employees at the same time and has granted merit increases to the deserving employees. It is also obvious from the record that the September 5, 1981 increases were not granted to the Lincoln Mercury employees to bring their salaries into line with the salaries of Respondent's employees because, as discussed above, the salaries of Respondent's employees, generally, were lower than those of the Lincoln Mercury employees even after they received the increase in May 1981. The effect of the September 5, 1981 increase was not to bring the Lincoln Mercury employees into parity with Respondent's employees but to increase, to a greater extent, the difference between the two groups of employees. Further, I am not persuaded that Brady was granted the increase in September because he had then passed an extended probationary period. It is difficult to believe that Respondent would have extended the usual 3-month probationary period to over a year and some months. In these circumstances I find that the increase granted to the Lincoln Mercury employees were the type of regularly scheduled increases referred to in the Decision and Order adopted by the Board.

Respondent concedes that it is "impossible to duplicate in a backpay proceeding the individual merit wage review which was the practice of the Respondent." However, Respondent contends that the most equitable approach to court-ordered increases is a percentage one in which the Respondent's employees would receive a 4.7-percent increase, the average percentage increase received by the Lincoln Mercury employees. Thus, although Respondent is of the viewpoint that its employees should receive only an average percentage increase, if any, it accepts that the raises given to the Lincoln Mercury employees provides a standard to determine the amounts due. Counsel for the General Counsel argues that the appropriate measure of the amount owed is the average of the raises given to the Lincoln Mercury employees. If Respondent's formula is utilized, the employees, generally, will receive less money. The Board has stated, consistently, that, where a Respondent's unlawful discrimination has made it impossible to determine whether a certain event would have occurred, absent the discrimination, any uncertainty must be resolved against the wrongdoer, whose conduct made certainty impossible.[12] Furthermore, according to Cavadini's testimony, Respondent had not used a percentage formula in the past to determine the amount of wage increase it would grant to its employees. Accordingly, I do not find a basis to accept Respondent's proposed formula, particularly where such a formula has not been used by Respondent and where its use now would penalize the employees.

In a situation such as exists herein, where it is impossible to determine how Respondent's employees would have been evaluated and how much, if any, merit increase each employee would have received, it is the Board's responsibility to attempt to fashion a remedy which will restore conditions to those which would have existed absent the discriminatory conduct.[13] Therefore, it appears appropriate to utilize the "average" approach formula proposed by the counsel for the General Counsel and utilized by the Board in similar situations.[14] Accordingly, I find that the appropriate measure of the amount of moneys owed to each discriminatee is the average of the raises given to the Lincoln Mercury employees on September 5, 1981. The parties are in agreement as to the moneys owed to the discriminatees assuming that the formula proposed by the counsel for the General Counsel is adopted. Thus, the amounts due are as follows:

[11] *Michael M. Schaefer*, 261 NLRB 272, 273 (1982).

[12] *Plasterers Local 90 (Southern Illinois Builders)*, 252 NLRB 750 (1980); *WHLI Radio*, 233 NLRB 326, 330 (1977).

[13] *Amshu Associates*, 234 NLRB 791, 795 (1978); *Golay & Co.*, 184 NLRB 241, 249 (1970).

[14] *Storto Sons Construction Co.*, 260 NLRB 1298 (1982); *Berry Schools*, 239 NLRB 1160, 1163 fn. 14 (1974).

Discriminatees	*Wage Increase*
Leland Aldredge	$683
William Bell	1312
Charles Burgess	1010
Pasquale Cicarelli	404
Arnold Colwell	-0-
Garry Currano	810
William Everett	821
James Holmes	871
William Hull	323
James Hussey	845
Nicholas Karoly	857
John Mulvey	730
Frederick Rauch	197
Robert Spiegel	836
Luis Velasquez	783

Although Respondent contends that Hussey was not entitled to bonus pay during the backpay period because of a decline in new car sales, the record reflects that Hussey did earn bonus moneys during that period. It also reflects that Hussey performed mechanical work other than work related to new car sales. It is conceivable that there would have been additional work for Hussey, for which he would have received additional bonus pay, if the Ford work had not been transferred to the Lincoln Mercury employees. Respondent has created a situation where it is impossible to determine what would have happened. In these circumstances, it should not receive a benefit from its unlawful conduct.[15] Accordingly, I find that Hussey is entitled to be included with the other mechanics who are entitled to bonus pay.

It is evident from the Decision and Order that the conduct found violative of the Act was the assignment of the maintenance work on the Ford cars to the Lincoln Mercury employees. Cheverie, whose testimony as noted was supported by Cavadini, stated that Respondent's representatives conceded that 70 percent of all the bonus work performed during the backpay period was Ford work. He accepted that figure as a reasonable one in view of the fact that it was within 10 percent of the figure estimated by Everett. In these circumstances it is apparent that that figure represents, as adequately as possible, the amount of bonus pay due to the four mechanics.[16] Accordingly, I find that Everett, Hull, Hussey, and Rauch are entitled to bonus pay as set forth below in Schedule A [omitted from publication].

[Recommended Order omitted from publication.]

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[15] *Famet, Inc.*, 222 NLRB 1180, 1182 (1976).

[16] It is clear from Cheverie's testimony that the 75 percent suggested by Travers was an offer to compromise during negotiation and does not represent necessarily an accurate figure of the amount of bonus work performed by the Lincoln Mercury employees.